No. 17-6086

IN THE

# Supreme Court of the United States

HERMAN AVERY GUNDY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

## Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioner


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## INTEREST OF THE *AMICI CURIAE*[1]

Downsize DC Foundation, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, Gun Owners Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). DownsizeDC.org, Free Speech Coalition, Public Advocate of the United States, and Gun Owners of America are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Restoring Liberty Action Committee is an educational organization. These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

## STATEMENT

Congress's effort to usurp the police power of the states with respect to sex offenders, through the federal Sex Offender Registration and Notification Act ("SORNA"), 120 Stat. 590, has been before this Court on two prior occasions.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

In Carr v. United States, 560 U.S. 438, 441 (2010), this Court determined, as a matter of statutory construction, that the criminal offense of failure to register under 18 U.S.C. § 2250 did not apply to sex offenders whose interstate travel occurred prior to SORNA's effective date.

And in Reynolds v. United States, 565 U.S. 432, 435, 441 (2012), this Court determined that the Act's registration requirements do not apply to persons convicted before the statute's enactment, a holding that was overridden by regulations issued by the Attorney General specifying that they must register. The Court "express[ed] no view on Reynolds' related constitutional claim" based on the nondelegation doctrine. *Id.* at 441. That issue is now before the Court, which granted certiorari to decide "[w]hether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d)[2] violates the nondelegation doctrine."[3]

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[2] The statute cited in the issue presented has been transferred to 34 U.S.C. § 20913(d), and states: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

[3] In the past, the creation and preservation of lists of American citizens have proven to be dangerous when in the hands of government. That is one of the reasons why Congress has prohibited the Bureau of Alcohol, Tobacco, Firearms and Explosives from setting up a centralized database of gun owners. *See* 18 U.S.C. § 923 Note (Pub. L. No. 112-55). Additionally, U.S.

## SUMMARY OF ARGUMENT

America's law students are taught that the federal government in Washington, D.C. is a government of separated powers — legislative, executive, and judicial. The question in this case is whether the federal government is truly one of separate powers, or one in name only. Stated another way, having vested separate powers in the separate branches — legislative in Congress, executive in the President, and judicial in the courts — will those divisions be honored by the federal government, so that the People may enjoy the blessings of liberty promised by the nation's founders in creating that structure.

If this Court decides this case according to the constitutional text and context at the time that the Constitution was written, there is no doubt that Congress has unconstitutionally ceded its legislative powers to the Attorney General, by authorizing a member of the executive department to deliberate and

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census information was revealed to have been improperly used during World War II for the apprehension and detention of Japanese-American citizens, a use apparently unknown to this Court when it approved those detentions. *See* Korematsu v. United States, 323 U.S. 214 (1944); L. Aratani, "Secret use of census info helped send Japanese Americans to internment camps in WWII," *Washington Post* (Apr. 3, 2018). Three decades later, the Select Committee to Study Government Operations' (Church Committee) Report on "Intelligence Activities and the Rights of Americans," revealed that "At least 26,000 individuals were at one point catalogued on an FBI list of persons to be rounded up in the event of a 'national emergency.'" Final Report (Apr. 14, 1976) Book II at 7.

enact the rules governing those persons in our civil society who are required to register with the government as a sex offender. After all, the very nature of legislative power is to make the rules of "civic conduct," and that power is vested in Congress, not the Attorney General who works for the President, and who in turn is vested with executive power, *i.e.*, to "carry into effect" those rules. Bound by the Constitution's government of separated powers, Congress cannot pass the legislative baton to the Attorney General in disregard of the bicameral and presentment principles of Article I, Section 7 which contemplate that, before a bill can become law, it must first be adopted by Congress, not by the President, and much less by the unelected head of the executive Department of Justice.

For a period of nearly 80 years, however, this salutary procedure by which a bill becomes law has been undermined by a pragmatic compromise. No longer is Congress required to make the rules. All it need do is enact an "intelligible principle," and the executive department can then be tasked not only to make the rules, but to superintend itself to make sure that they are carried out. According to the "intelligible principle" test, all the government need do is provide a sensible reason for the merging of legislative and executive powers, to carry out as broad of a stated policy objective as Congress chooses, leaving the details to the various unelected and unaccountable executive departments, agencies, bureaus, and commissions to fill in the gaps. In truth, the "intelligible principle" is neither "intelligible" nor "principled." Rather, it is bankrupt because it fails to

serve the purpose of a written constitution to actually limit the powers that the People have conferred upon their governors, lest their liberties be lost.

The separation of powers among the branches must not be viewed as an historical relic of a simpler age. The need to separate powers to limit government has been studied for at least 2,300 years, with deep roots in the revelation of Scripture about the sinful nature of man, the different functions associated with law, and the division of offices which God established for the nation Israel. The Founders understood these principles and developed a structure of government which embodied them, to the end that government would be limited, and the liberty of the People would be protected and preserved.

The delegation of legislative power to the Attorney General in this case is particularly problematic. First, there were no intelligible principles to be applied. Second, the executive officer who was delegated legislative power to create the crime here is the same officer responsible to enforce federal criminal law. Third, the case involves not any type of rule, but the creation of a crime which authorizes the federal government to deprive Americans of their liberty — a fearsome power that requires legislators to write those laws, and be directly accountable to the People. Lastly, the judicial branch cannot trust the political branches to enforce the constitution's structural protections. Elected legislators seek to avoid making tough decisions in order to avoid offending any group of voters, while the unelected bureaucrats of the executive branch seemingly cannot resist the

temptation to use any justification whatsoever to wield legislative power. The duty to protect the structure proposed by the Framers and ratified by the People now falls upon this Court.

## ARGUMENT

### I. BY VESTING THE LEGISLATIVE POWERS ENUMERATED IN THE CONSTITUTION TO CONGRESS, THE PEOPLE EMPOWERED CONGRESS, NOT THE ATTORNEY GENERAL, TO MAKE THE RULES OF CIVIC CONDUCT.

Petitioner contends that Sex Offender Registration & Notification Act ("SORNA") § 20913(d) "grants the Attorney General quintessentially legislative powers ...." Brief for Petitioner ("Pet. Br.") at 23. As is true of the other governmental powers vested by the Constitution — the executive (Article II, Section 2) and the judicial (Article III, Section 1) — the legislative power vested by Article I, Section 1 is not defined in the instrument. Although each power is distinct from the other — as attested by the tripartite division setting forth each of the three powers — one must look outside the written document for working definitions for each function.

At the time of fashioning of the Constitution, the distinctions among the three classes of governmental powers were commonly understood. Hence, in his 1828 American Dictionary of the English Language, Noah Webster summarized each of the three, noting their similarities and distinctions:

> the body that deliberates and enacts **laws**, is **legislative**; the body that judges or applies the **laws** to particular cases is **judicial**; the body or person who carries the **laws** into effect, or superintends the enforcement of them, is **executive**. [*Id.* at 76 (definition of "executive") (emphasis added).]

While all three powers are distinct, they all are defined in relation to "laws."

"Laws," in turn, are understood in their primary sense, to be "rules" relating to the "community in general." I W. Blackstone's Commentaries at 44. As Blackstone put it, the "laws" of a civil society are "rule[s] of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." *Id.* (internal quotations omitted). Applying this definition of "law" here, there can be no question that SORNA § 20913(d) empowers the Attorney General to exercise legislative power, "prescrib[ing] rules, backed by criminal sanctions, governing the conduct of roughly half a million private individuals, including petitioner." Pet. Br. at 23.

But there is more. If, by delegation of authority to the Attorney General in SORNA § 20913(d), Congress conferred no more than power to make rules governing the Attorney General's exercise of discretion in the enforcement of a Congressionally enacted rule, then there would have been no need to say so. Such executive discretion would be inherent in and ancillary to the Attorney General's exercise of his executive power, and such discretionary enforcement power need

not have been expressly reserved, much less delegated. *See* Mistretta v. United States, 488 U.S. 361, 416-19 (1989) (Scalia, J., dissenting). But that is not what occurred here. Congress deliberately chose to enlist the Attorney General to resolve the contentious debate between the House and the Senate over whether SORNA's registration requirements "'would apply to persons who had been convicted of qualifying sex offenses before SORNA's effective date.'" Pet. Br. at 7.

It is, however, the constitutional duty for Congress, as the nation's lawmaking branch, to "deliberate and enact" a proposed "rule" into law, not to appoint someone from the executive branch to resolve a policy impasse between the two houses of Congress. As the "enacter" of the laws, it is the province of the legislative branch to take the initiative, and it is for the executive and judicial branches to respond — the executive to "enforce" the law as enacted and the judicial to say what the law is.[4]

Hence, in a government of enumerated powers, the other branches are to wait until the legislative branch acts. Yet, by enacting SORNA § 20913(d), authorizing the Attorney General[5] to take the initiative to

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[4] *See* Osborn v. Bank of the United States, 22 U.S.738 (1824). Justice Marshall applied the law as it is written: "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect ... to the will of the law." *Id* at 866.

[5] The problem of unlawful delegation is even clearer, as here, when the member of the executive branch appointed to write a criminal law is the same person charged with prosecuting that

determine whether SORNA should require all sex offenders to register, Congress passed the legislative baton to the executive, contrary to the limited role of the executive to "carry out" the law, not to "deliberate and enact" the law. To rule otherwise would undermine the carefully crafted procedural rules governing the order whereby a bill becomes a law, beginning with Congress — the legislative branch — and ending with the President — the executive branch. In this case, the government asks the Court (i) to dispense with the bicameral and presentment principles set out in Article I, Section 7 *(see* INS v. Chadha, 462 U.S. 919, 951 (1983)) and (ii) to disregard the natural order within which the three powers are exercised, as reflected in the Constitution's first three articles — legislative, executive, and judicial.

## II. THE INTELLIGIBLE PRINCIPLE TEST IS BANKRUPT AND SHOULD BE ABANDONED.

As Petitioner points out in his brief, this Court devised the "intelligible principle" test to demarcate the distinction between "lawmaking" and "law-enforcing." The theory was to permit Congress to delegate some of its legislative function, because strict adherence to the Constitution's structure of separation of powers is allegedly impractical "'in our increasingly complex society, replete with ever changing and more technical problems.'" Pet. Br. at 26. But it is not for Congress or this Court to amend, or even to modulate,

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crime.

the Constitution to accommodate changing times. Rather, as Chief Justice Marshall reminds us in Marbury v. Madison, 5 U.S. 137 (1803), "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness...." *Id.* at 176. And, because the people "can seldom act," the Chief Justice continues, the nation's foundational legal principles are "designed to be permanent." *Id.* Foremost among these permanent principles, the Chief Justice asserts, is the "organiz[ing] [of] the government, and [the] assign[ation], to different departments, their respective powers":

> It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. [*Id.*]

Thus, Article I, Section 1 "vests" the legislative power in Congress, and nowhere else. How well has the "intelligible principle" test measured up as a meaningful balance on Congress's passing legislative functions on to some other department without shirking its duty to make the laws? As the Government has conceded, there have been only two cases in which a statute has failed the "intelligible principle" test, and both of those cases were over 80 years ago. Brief for the United States in Opposition ("U.S. Br.") at 23. That record should come as no surprise — not because Congress has been complying

with constitutional limits, but because the "intelligible principle" test is a test that almost no legislative delegation could fail. According to Webster, "intelligible" means "capable of being understood." "Sensible." Thus, the Government asserts that the basis of the SORNA delegation to the Attorney General is "intelligible" because Congress "'broadly set policy goals that guide the Attorney General,' and it 'created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders.'" U.S. Br. at 23. What could be more sensible than that? Indeed, as the Eleventh Circuit in United States v. Ambert, 561 F.3d 1202 (11th Cir. 2009), opined, a "review of the legislative history ... confirms the broad purpose of the statute":

> that there were 100,000 to 150,000 sex offenders who were failing to comply with state registration requirements, that the situation was "killing our children," and that SORNA would "get tough" on those persons and decrease the number of sex offenders violating registration requirements. [*Id.* at 1214.]

In reality, the "intelligible principle" test itself cannot be taken literally, as it is neither "intelligible" nor "principled." Rather, as Justice Scalia has recounted: "The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the *degree* of generality contained in the authorization for exercise of executive ... powers in a particular field is so unacceptably high as to *amount* to

a delegation of legislative powers." Mistretta at 419 (Scalia, J., dissenting). Regardless of the stated purpose of the law, the bottom line is simply whether the Constitution requires Congress — not the Attorney General — to make the "fundamental legislative choices." Pet. Br. at 33.

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed. [Marbury at 176.]

## III. SEPARATION OF POWERS — AN ESSENTIAL PREREQUISITE FOR A LIMITED NATIONAL GOVERNMENT.

The doctrine that powers must be divided and separated in order to protect the people from their government is generally attributed to Charles de Montesquieu, a French judge who developed that theory during the first half of the 18th Century, and who was much read and admired by the Framers. *See* Pet. Br. at 18. As Montesquieu observed, separation of powers is a necessary precondition to political liberty, where the people do not live in fear of those men then responsible for running their government:

> The **political liberty** of the subject is a tranquillity of mind arising from the opinion each person has of his **safety**. In order to have

> this liberty, it is **requisite** the government be so constituted as one man need not be **afraid** of another. [Montesquieu, The Spirit of Laws, Chap. VI (emphasis added).]

Conversely, when that separation is violated, particularly when the legislative and executive powers are joined, the people come to fear those men exercising governmental power, and liberty ceases to exist:

> When the legislative and executive powers are **united** in the same person, or in the same body of magistrates, **there can be no liberty**; because **apprehensions** may arise, lest the same **monarch** or **senate** should **enact** tyrannical laws, to **execute** them in a tyrannical manner. [*Id.* (emphasis added).]

However, Montesquieu was not the first political philosopher to speak to this issue, having developed, enhanced, and clarified the work of others writing over two millennia, including Aristotle, Polybius, and John Locke.[6] Moreover, it would be a mistake to ignore the Biblical underpinning of this doctrine. Holy Writ teaches the danger of entrusting power to any man, because of the sinful nature of man: "The heart is deceitful above all things, and desperately wicked: who can know it?" Jeremiah 17:9. Madison expressly

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[6] For a recent overview of both the history of the Separation of Powers Doctrine and jurisprudence in that area, see Department of Transportation, et al. v. Association of American Railroads, 575 U.S. ___, 135 S.Ct. 1225, 1240 (2015) (Thomas, J., concurring).

embraced this Biblical understanding of man in Federalist No. 51, writing: "If men were angels, no government would be necessary." G. Carey and J. McClellan, eds., The Federalist (Liberty Fund: 2001) at 269. However, since men are most decidedly not angels, Madison explained that:

> [i]n framing a government which is to be administered by **men over men**, the great difficulty lies in this: you must first **enable the government** to control the governed; and in the next place oblige it **to control itself**.[7] [*Id.* (emphasis added).]

Of course, spreading power and responsibility among individuals is not a principle unique to government, as:

> [t]his policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.... These

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[7] There is an Old Testament teaching which is instructive here. Immediately after anointing Saul as king, the prophet Samuel established the first written constitution which would bind the new king: "Then Samuel told the people **the manner of the kingdom**, and wrote it in a **book**, and laid it up before the Lord. And Samuel sent all the people away, every man to his house." I Samuel 10:25 (emphasis added). Thus, Saul was not made king to rule as he wanted, but he was to serve under the limitations of God-ordained statutes. *See* Deuteronomy 17:18-20. King Saul failed to respect the limitations on his God-given authority, usurping the role of a priest in making a burnt offering, and for that usurpation of priestly authority, he lost his kingdom. *See* 1 Samuel 13.

> inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state. [*Id.*]

One of the reasons that our nation has survived 229 years is that the Framers incorporated into the Constitution which they proposed for ratification a structure for the national government which recognized the inherent limitations of the people who would be entrusted to run that government — including both them and their successors. The illogic of trusting rulers more than the people was explained by Frederic Bastiat in 1850:

> [If] the natural tendencies of mankind are so bad that it is not safe to allow them liberty, how comes it to pass that the tendencies of these organizers are always good? Do not the legislators and their agents form a part of the human race? Do they consider that they are composed of different materials from the rest of mankind? [Frederic Bastiat, The Law (Von Mises Institute: 2007) at 46.]

More specific guidance as to precisely how governmental power should be divided can be drawn from Isaiah 33:22, which identifies three distinct ways in which God interacts with man with respect to the Law: "For the Lord is our **judge**, the Lord is our **lawgiver**, the Lord is our **king**; he will save us." (Emphasis added.) It is difficult to read this passage without understanding how it formed the pattern for

our federal constructional structure.[8] All attributes of sovereignty are seamlessly united in a perfect, holy, and just God, but could never be allowed to be united in the hands of one, or any group of sinful men. Indeed, echoing Montesquieu's analysis, Madison contended that the federal structure established by the Constitution was essential to preserve liberty for the people:

> The **accumulation of all powers, legislative, executive, and judiciary**, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced **the very definition of tyranny**. Were the federal constitution, therefore, really chargeable with this accumulation of power, or with a **mixture of powers**, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. [Federalist No. 47, at 249, *supra* (emphasis added).[9]]

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[8] Indeed, when the people of Israel rejected God's direct rule through judges, Moses and his successor judges exercised all three powers. The people asked for a king like all the nations, one with total power. *See* I Samuel 8. In his mercy, God gave the people a covenant king bound by he law, as promised in Deuteronomy 18, the legislative power remaining with God alone, the judicial power remaining in Samuel, the judge. I Samuel 7:15-17. Thus, the three powers were separated once Saul was made king.

[9] *See also* Pet. Br. at 18.

Sadly, the statute now under review demonstrates that the Constitution which Madison was defending has not served to prevent a "mixture of powers" from occurring — in that each branch has been unfaithful to the original plan. During the era of the intelligible principle test, the political branches have failed to preserve the constitutional structure. Under SORNA, one would have hoped that Congress would have been protective of its own prerogatives, declining to vest in the Attorney General the power to write a law. And, one would have hoped that a succession of Attorneys General would have refused to exercise discretionary legislative power. *See* Pet. Br. at 6-12. Finally, the third branch of government has also failed in enforcing Justice Scalia's high view of the importance of constitutional structure, when he said "[it] is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded." Mistretta v. United States at 415 (Scalia, J., dissenting).

Divine writ, verified by human experience, demonstrates that adherence to the structural protections of the Constitution is a necessary precondition for a free society to preserve "liberty," which Bastiat explained to be the result of "an act of faith in God and in His work." The Law at 55.

## IV. THE JUDICIARY HAS A DUTY TO PROTECT AMERICANS FROM CRIMINAL SANCTIONS CRAFTED BY UNELECTED BUREAUCRATS.

It may be late in the day for this Court to return to the constitutional text, as the imprecise, if not deeply

flawed "intelligible principle" doctrine was adopted by this court nine decades ago in J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). However, that is what needs to be done. Since Chief Justice Taft penned those words, that test has come to eclipse the relevant constitutional text in the minds of most justices and often lawyers as well. As lamented by Justice Thomas in a recent case asserting the nondelegation doctrine, "none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). However, in this case, the petitioner's brief most certainly did not neglect the constitutional text, hopefully making this the "future day" referred to by Justice Thomas where he "would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Id.* The foundational importance of preserving the separation of powers cannot be overstated.

Although it has been 83 years since a delegated power was struck down, in the recent past, this Court has checked the power of the executive to rely on a federal treaty, without any implementing congressional legislation, and to use it as the basis for a federal criminal prosecution of a local crime. *See* Bond v. United States, 564 U.S. 211 (2011) ("Bond I") and Bond v. United States, 572 U.S. ____, 134 S.Ct.

2077 (2014) ("Bond II").[10] In a decision by Chief Justice Roberts in Bond II, this Court concluded that the government's "sweeping reading of the statute would fundamentally upset the Constitution's balance" between the states and the federal government. The concurrence by Justice Scalia went further and advanced the view that Congress could not constitutionally federalize a purely local crime. *Id.* at 2094 (Scalia, J., concurring). The same situation obtains here.

Although these *amici* would urge the Court to go further, to turn completely away from current nondelegation doctrine and its unworkable "intelligible principle" test, at a minimum barring the executive from creating crimes would seem to be an easy case. In our system based on dual sovereignty, Congress has usurped the states' role in criminal law, a power that the national government was never designed to have.

Conspicuously absent from those "few and defined" powers[11] vested in the national government is a general police power, including the power to enact and enforce a generally applicable criminal code — a power reserved by the Tenth Amendment to the States. *See* The Federalization of Criminal Law 5-6 (ABA Task

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[10] Some of the *amici* in this case filed *amicus* briefs in each of the two Bond v. United States cases (in 2010 and in 2013).

[11] *The Federalist No. 45* ("The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite.").

Force on the Federalization of Criminal Law: 1998) ("ABA Task Force Report").

The political branches cannot be relied on to protect the separation of powers, and for good reason. The political branches are highly political. The primary objective of any modern politician is simple — re-election. Difficult questions have constituencies on both sides and any decision necessarily makes some group unhappy. Therefore, the temptation for any incumbent politician is to find ways to avoid making a difficult decision whenever possible. *See generally* J. Miller, Monopoly Politics (Hoover Institute Press: 1999) at 89, 127-29.

When legislative decisions can be handed off to an appointed official who does not face the voters, the problem of re-election is solved — especially when the unelected bureaucrat can be counted on to carry out the private agenda of the legislator. Should his constituents call to complain about a new regulation, the congressman can simply explain: "I didn't make that decision. The experts did. And there is nothing I can do about it. Complain to them." For its part, the executive branch rarely resists the impulse to exercise legislative power. The result is that an unconstitutional delegation of legislative power actually serves the interests of both of the political branches, but harms the interests of the People.

In the past, Congress has been offered proposed legislation designed to prevent the unlawful delegation of its duties, but has had little appetite to pass such a law. Indeed, *amicus* DownsizeDC.org has developed

and promoted legislation which would provide a process to protect the separation of powers by requiring Congress, as the legislative body, to follow certain steps.[12] The bill would prohibit any delegation of legislative powers, including those which would create any civil or criminal liabilities, to any other branch or to any administrative agency. The bill was designed to implement the separation of power principles of Kilbourn v. Thompson, 103 U.S. 168 (1881), that the Constitution:

> has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government [and] the powers confided by the Constitution to one of these departments cannot be exercised by another. [*Id.* at 191.]

Although the Write the Laws Act was introduced once in the House and several times in the Senate, it attracted little support.[13]

This political reality cries out for this Court to step in to protect the structural framework mandated by the Framers and the People. And, this case should be

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[12] *See* DownsizeDC.org, The Official Text of Downsize DC's "Write the Laws Act" (WTLA), https://downsizedc.org/the-official-text-of-downsize-dcs-write-the-laws-act-wtla/.

[13] *See, e.g.*, H.R. 4343, "Write the Laws Act" (113th Congress) (Rep. Steve Stockman, R-TX); S. 1575, "Write the Laws Act" (114th Congress) (Sen. Rand Paul, R-KY).

an excellent vehicle by which to take a major step in textual restoration, as it raises perhaps the most serious type of delegation issue — congressional empowerment of the executive to criminalize otherwise lawful behavior, leading to the loss of liberty, and often property, of American citizens.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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